BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GERALD R. CHRANS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,036,490
MIDWEST ROOFING SERVICES, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 7, 2007, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

In the November 7, 2007, Order, Judge Barnes determined claimant injured his back on both June 9 and August 16, 2007, while working for respondent. Accordingly, the Judge awarded claimant medical benefits and temporary total disability benefits.

Respondent and its insurance carrier contend the preliminary hearing Order should be reversed. They first argue claimant was working for respondent as an independent contractor on June 9, 2007, and, therefore, they are not responsible for that accident under the Workers Compensation Act. Next, they argue the August 16, 2007, alleged injury did not rise to the level of an injury under the Act and, therefore, they are not responsible for that accident. Finally, they argue claimant is not entitled to receive temporary total disability benefits as respondent could have accommodated claimant's injury and restrictions.

Conversely, claimant contends the preliminary hearing Order should be affirmed. Claimant argues he worked for respondent as an employee rather than an independent contractor. He also argues the question whether claimant's August 16, 2007, accident was temporary or permanent in nature is not relevant at this stage of the claim. Finally, claimant argues the Board does not have the jurisdiction or authority at this juncture to

review the issue regarding temporary total disability benefits that respondent and its insurance carrier have raised.

In summary, the issues raised to the Board on this appeal are:

1. Was claimant an employee of respondent on June 9, 2007, for purposes of the Workers Compensation Act?

2. Did claimant's August 16, 2007, accident constitute an injury under the Act?

3. Does the Board have the jurisdiction and authority at this juncture of the claim to determine whether claimant satisfies the definition of being temporarily and totally disabled? If so, is claimant temporarily and totally disabled?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, for preliminary hearing purposes the undersigned finds and concludes the November 7, 2007, Order should be affirmed.

Respondent and its insurance carrier do not dispute that claimant injured his back on June 9, 2007, or that the accident arose out of and in the course of the work he was performing for respondent. But they contend they are not responsible for the injuries that claimant sustained on that date as claimant was working for respondent as an independent contractor.

Respondent, which is a roofing company, employed claimant as a roofing estimator and salesman. In that role, claimant inspected the roofs of potential customers, provided the customers with estimates of the costs of repairs, and obtained contracts for the repairs. And claimant priced the estimates of the repairs in the manner respondent directed. Claimant was required to attend the company meetings respondent held every Friday morning.

The vast majority of the time, claimant drove his own truck to his appointments. And he generally used his own ladder and other tools. Respondent, however, provided the tools that claimant needed but did not possess, including longer ladders. Respondent also assigned its employees to help claimant when needed. Respondent provided claimant with a business card that bore his name and that of respondent.

When claimant began working for respondent in April 2006, he was told he would be an independent contractor. Accordingly, respondent did not withhold taxes from the monies it paid claimant and respondent provided claimant with a 1099 for the 2006 tax

year. Respondent paid claimant a commission that was based upon his sales. For the period from April through December 2006, respondent paid claimant approximately $119,350 for that eight-month period. On the other hand, for the period from January through June 8, 2007, respondent paid claimant $24,900.

From the first Friday in December 2006 through the last Friday in May 2007, respondent paid claimant $750 per week that claimant testified was either a loan or unearned commission. Following that period, claimant was paid $1,250 per week until approximately August 20, 2007, the last day that claimant believes he worked for respondent. It is not clear from the record whether any of those sums are included in the $119,350 that was paid claimant during 2006 or the $24,900 that was paid claimant during 2007. Claimant did not receive any fringe benefits or additional compensation items such as vacation leave, sick leave, or insurance benefits.

According to claimant, in addition to performing roof estimates he also began doing other work for respondent such as going to an architect's office to obtain blueprints, began teaching other salesmen how to trace leaks, and traveled to other states to survey the damage from hailstorms. Claimant testified he began performing those other duties at the same time respondent began paying him over and above his sales commissions.[1]

Claimant did not have a set time that he had to report to work or a set time when he could leave work. Respondent, however, scheduled the vast majority of claimant's appointments. For other than illness, respondent required two days notice of any intended absence from work.

Other individuals worked for respondent and performed work similar to that performed by claimant. But claimant did not know the details of the relationships between respondent and those other salesmen. On the other hand, respondent's owner, Darren Ward, testified respondent had employees that also prepared roofing estimates. Those employees, however, drove company vehicles, had taxes withheld from their checks, were required to be at work during a certain period, and were covered by respondent's insurance.

It is sometimes difficult to determine whether a person is an employee or independent contractor as there are elements pertaining to both relationships that may be present.[2] Moreover, there is no absolute rule that is determinative.[3] The relationship

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[1] Chrans Depo. at 42.

[2] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[3] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

depends upon all the facts and circumstances and the label that the parties choose to employ is only one of those facts. Consequently, the terminology used by the parties is not binding.[4]

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control, right of supervision, or the right to direct the worker in the manner the work is to be performed. It is the existence of the right or authority to control, not the actual exercise of that right, that renders one a servant rather than an independent contractor.[5]

In addition to the right to control and the right to discharge a worker, other commonly recognized tests used in analyzing the relationship between parties are:

(1) the existence of a contract to perform a certain piece of work at a fixed price;

(2) the independent nature of the worker's business or distinct calling;

(3) the employment of assistants and the right to supervise their activities;

(4) the worker's obligation to furnish tools, supplies, and materials;

(5) the worker's right to control the progress of the work;

(6) the length of time that the worker is employed;

(7) whether the worker is paid by time or by the job; and

(8) whether the work is part of the regular business of the employer.[6]

Considering those factors, the undersigned agrees with the Judge that on June 9, 2007, claimant was working for respondent as an employee for purposes of the Workers Compensation Act. In short, the work claimant performed for respondent was integral to its business as a roofing company. Claimant did not perform a certain piece of work for respondent at a fixed price. Instead, claimant worked for respondent on an extended, ongoing basis. Claimant did not operate an independent company in which he provided

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[4] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[5] *Wallis*, 236 Kan. at 102, 103.

[6] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

services for others than respondent and he did not hire assistants to help him in his work. Moreover, respondent scheduled claimant's appointments and claimant was required to provide advance notice of his intended absences. Consequently, claimant is entitled to receive workers compensation benefits for the June 9, 2007, accident.

On August 16, 2007, claimant experienced additional pain in his back when he moved a ladder while working for respondent. Claimant testified that with narcotics his back pain eventually returned to the level it was before that incident. Accordingly, there may be a question whether the August 2007 incident only temporarily aggravated claimant's back. Nonetheless, a worker is entitled to receive medical benefits under the Workers Compensation Act whether an injury is temporary or permanent.

Moreover, the Act's definitions of accident and injury are quite inclusive:

K.S.A. 2006 Supp. 44-508(d) defines accident:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. *The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.* In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act. (Emphasis added.)

And K.S.A. 2006 Supp. 44-508(e) defines injury:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. *It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.* An injury shall not be deemed to have been directly caused by the employment where it is shown that

> the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living. (Emphasis added.)

The undersigned finds claimant is entitled to receive medical benefits for the injuries sustained at work in June 2007 as well as medical benefits for any injury he suffered on August 16, 2007.

The last issue raised by respondent and its insurance carrier in this appeal is whether the Judge erred by awarding claimant temporary total disability benefits when respondent could allegedly accommodate his injury and restrictions. The Board, however, does not have the authority or jurisdiction to review that issue in the appeal of a preliminary hearing award. The Workers Compensation Act specifically limits the Board's review of preliminary hearing awards to the following issues:

(1) Did the worker sustain an accidental injury?

(2) Did the injury arise out of and in the course of employment?

(3) Did the worker provide timely notice and timely written claim?

(4) Is there any defense to the compensability of the claim?[7]

In addition, the Board has the jurisdiction to review those preliminary hearing orders in which the judge has exceeded his or her jurisdiction or authority.[8]

There is no question that the Judge had the authority to determine whether claimant was temporarily and totally disabled for purposes of the Workers Compensation Act. Consequently, that issue is not a jurisdictional issue the Board can review in an appeal from a preliminary hearing award.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[7] K.S.A. 44-534a.

[8] K.S.A. 2006 Supp. 44-551.

[9] K.S.A. 44-534a.

WHEREFORE, the undersigned affirms the November 7, 2007, Order entered by Judge Barnes.

IT IS SO ORDERED.

Dated this ____ day of January, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge